No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICES, INC., et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF COMPUTER SERVICE NETWORK INTERNATIONAL IN SUPPORT OF RESPONDENTS

RONALD S. KATZ
Counsel of Record
General Counsel for Computer Service Network International
COUDERT BROTHERS
4 Embarcadero Center
Suite 3550
San Francisco, CA 94111
(415) 986-1300

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTEREST OF *AMICUS CURIAE*[1]

Computer Service Network International ("CSNI") is an organization of over 400 independent service organizations (*i.e.*, firms which service equipment they do not manufacture) servicing high-tech equipment ranging from computers to copiers and micrographic equipment to medical equipment. These organizations (hereafter

[1] Counsel of record have consented to the filing of this *amicus* brief and those letters have been filed with the Clerk pursuant to Supreme Court Rule 37.

"ISOs") account for over $1.5 billion in commerce and are located in 11 countries, primarily the United States. Some members are large companies (TRW, Bell Atlantic), and others are medium-sized and small businesses. The Association of Independent Medical Service Companies ("AIMS") has recently merged with CSNI. Its primary focus is servicing high-tech medical equipment.[2]

CSNI is a non-profit corporation incorporated in the District of Columbia; its purpose is to promote and maintain a closer union and organization of ISOs. Specifically, CSNI develops educational methods to increase awareness about ISOs and studies economic problems confronting the industry.

Each CSNI member offers its own brand of service. For example, each of the CSNI members which service IBM computers offers a different brand of service for IBM computers. These members participate in interbrand competition with each other and with IBM. Members which have the capabilities and parts to compete with IBM for service business do not, because of the uniqueness of those parts and capabilities, then have the capability to compete for the service business of companies which use a computer manufactured by a company other than IBM, for example, Data General or Hewlett-Packard.

Because copiers and micrographic equipment are high-tech equipment, just as computers are, the analysis is the same. Just as there are different brands of copiers and micrographic equipment, there are different brands

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[2] Membership lists of both CSNI and AIMS have been lodged with the Clerk and are tabbed "H."

of service for a particular copier, such as Kodak's. Copiers and micrographic equipment, like most high-tech equipment, have unique components and parts. One manufacturer's copier varies substantially from another manufacturer's copier. Thus, ISOs which service a particular brand of copier are not, by virtue of that fact, capable of servicing another manufacturer's copier.

Contrary to Kodak's assertions, this case does not concern interbrand competition for copiers and micrographic equipment. It concerns interbrand competition for the service of Kodak copiers and micrographic equipment. CSNI is submitting this brief as an *amicus curiae* because, if the Ninth Circuit's decision is reversed on market definition grounds, an entire industry will be destroyed. ISOs for high-technology equipment will cease to exist or will exist only at the sufferance of manufacturers. The end result will be that competition for service will be eliminated and consumers will have less choice and will pay higher prices.

Additionally, manufacturers' fears that ISOs will give their brand a bad name are unfounded at best. The marketplace will take care of firms that do not produce quality work by eliminating those firms from the market.

Finally, Kodak's doomsaying is without foundation. Not only has every other civilized country which has ruled on this matter adopted the same rule as the Ninth Circuit, but also the most successful computer company in history – IBM – has for over thirty-five years been required by its consent decree to provide spare parts to ISOs. *United States v. International Business Machines Corp.*, 1956 Trade Cas. (CCH) ¶ 68,245 (S.D.N.Y. Jan. 25, 1956).

II. SUMMARY OF ARGUMENT

If this Court gets past the procedural issues surrounding a grant of summary judgment when the record reveals many disputes of material fact and when plaintiffs were not allowed to develop their case, then market definition is the essence of this case. Kodak claims that the market this Court should be concerned with is that of copiers and micrographic equipment in general. The proper inquiry is whether service of Kodak copiers and micrographic equipment can constitute a relevant market. This Court since at least *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563 (1925) has held that such an inquiry is factual.

For this reason, the ISOs in this case should be allowed to present their claims to a jury. Two other courts have permitted the issue of market definition to go to the jury and these juries have come back in favor of the independent service firms. *HyPoint v. Hewlett-Packard*, No. C87-2484 (N.D. Ohio 1990); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, No. 89-CV-71762-DT (E.D. Mich. 1990). Appeals on both matters are pending before the Sixth Circuit.

Kodak claims that it is necessary to monopolize its parts in order to compete in the interbrand market for copiers and micrographic equipment, and that a relevant market for service of a manufacturer's system is too narrow a definition. Every other country or multinational organization that has considered these issues has come down on the side of ISOs and on the side of competition.

In the United States, manufacturers, including Kodak, used to provide ISOs with spare parts and other

goods and services on liberal terms. These practices fostered the development of ISOs. Now the manufacturers are trying to change a well-established pattern of distribution without a valid business justification.

III. ARGUMENT

A. History Of Independent Service Organizations

When manufacturers first started making high-tech equipment such as computers, copiers and micrographic equipment, they considered maintenance as a necessary but economically unimportant aspect of selling this equipment. They fostered growth of an independent repair and maintenance industry by providing the new service companies inexpensive or free services, such as training, expedited delivery of parts, and diagnostic software. In turn, the ISOs recommended the brand they serviced to their customers, which fostered brand loyalty.

Then the economics of the industry changed. The price of computers dropped, and the demand for high quality and reliable service rose sharply. Suddenly, more of the profits were in maintenance, and manufacturers sought to regain the market share they had fostered for the ISOs. By taking away the benefits they had provided, manufacturers succeeded in driving many ISOs out of business. It was only then that litigation on this issue developed.

In fact, the manner in which the ISOs flourished and then suffered is similar to *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585 (1985). In *Aspen Skiing*, the owner of three of four mountains in a destination ski resort cooperated for many years with the owner

of the other mountain in the area. *Id.* at 589. When the venture no longer suited its purposes, the three-mountain owner cut off its competitor. *Id.* at 594. This Court unanimously held that this conduct violated the antitrust laws. *Id.* at 611.

This Court recognized the well-established maxims that a business has the right to select its own customers and a competitor need not cooperate with other competitors. *Id.* at 600. This Court also acknowledged that those rights are not unqualified. *Id.* at 601. The Court stated: "[In *Aspen Skiing*], the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* at 603.[3]

This same cooperation occurred not only between Kodak and the ISOs involved in this case, but also between many other manufacturers and the ISOs which serviced their high-tech equipment. Indeed, it was the manufacturers themselves which created the industry of ISOs which forms the basis of this trade association. As in

[3] The Court elaborated on this point by quoting from Robert Bork's book *The Antitrust Paradox*, 156: "In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs." *Id.* at 604, n.31.

Aspen Skiing, when it suited their interests, the manufacturers encouraged the growth of ISOs. The manufacturers should not now be permitted, after a certain "pattern of distribution" has developed, to abruptly alter the status quo.

B. Market Definition

Kodak claims that there is no market for the service of Kodak copiers and micrographic equipment; the *amici* supporting Kodak's position make a similar claim with regard to other high-tech equipment. However, the very existence of CSNI, which has over 400 ISOs as members, refutes this argument. There is a demonstrated demand by consumers for independent companies which service high-tech equipment. If such a demand were not present, those organizations would not have come into existence and prospered.

One point is irrefutable: ISOs by definition do not manufacture high-tech equipment and therefore do not compete in that interbrand product market. Consequently, they compete in the market for maintenance of high-tech equipment. The facts that ISOs exist, that they serve consumer needs, and that they must overcome substantial barriers to entry illustrate that there is a market for the maintenance of high-tech equipment.

Barriers to entry – for example substantial investment in training and inventory – exist with respect to each manufacturers' brand of high-tech equipment. This fact illustrates that there is no reasonable interchangeability between service of different manufacturers' high-tech equipment. If your Kodak copier is broken, it does you no good to call Xerox or Canon.

Therefore, the service markets are limited by each manufacturer's brand. Within that brand of equipment, there are numerous brands of service of that equipment.

Kodak controls the supply of spare parts for its equipment. The incentive for independent suppliers of spare parts to arise in this market is dampened by high technological barriers and the frequency of product change in the high-tech industry. By the time a potential alternate supplier spent the resources to overcome the technological barriers to entry, it is likely that the next generation of equipment will have come into existence. The parts distributed by the alternate supplier may no longer be relevant to the new generation of product.

1. The relevant market defined in this case is evidenced by the existence of forcing.

This Court set forth tests for market definition in *United States v. E.I. duPont de Nemours & Company*, 351 U.S. 377 (1956) and *Brown Shoe Company v. United States*, 370 U.S. 294 (1962). The *duPont* Court held that "the relevant market depends upon the availability . . . of alternative commodities for buyers: i.e., whether there is a cross-elasticity of demand. . . ." *duPont*, 351 U.S. at 380. Cross-elasticity of demand expresses how price movement in one market affects demand for goods or services in other markets. Where products are similar and the price of one product increases sharply, consumers will substitute other products. Because a particular manufacturer's copier needs unique parts and requires unique knowledge to repair, it is not possible for consumers to switch to a maintenance firm which services another

manufacturer's copier. Thus, the plaintiffs in this case meet the *duPont* test because consumers requiring maintenance of Kodak copiers and micrographic equipment are not able to turn to organizations which service other manufacturers' products.[4]

Additionally, there is a practical point with respect to market definition. When forcing exists, it follows that reasonably interchangeable substitutes do not exist and, therefore, that there is a market for that particular service or product. It is simple logic that it would not be possible for a manufacturer to force a consumer to use that manufacturer for service if there were substitutes available.

In this case, by severely limiting access to its parts, Kodak is essentially forcing end users to choose Kodak for maintenance. Without access to parts, ISOs are unable to perform maintenance on Kodak copiers and micrographic equipment.[5] As a result, customers are left to choose only Kodak for service.

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[4] This court has also examined "practical indicia" to define the relevant product market. *Brown Shoe*, 370 U.S. at 325. Those practical indicia include "industry or public recognition of the submarket . . . the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." *Id.* In this case, there was no economist, so there was no development of that part of the record. These factors were, however, discussed in an affidavit filed by Professor Mackie-Mason in the *Virtual* case at ¶ 60. This Court may take judicial notice of this court filing, *United States v. Author Services, Inc.*, 864 F.2d 1520, 1523 (9th Cir. 1986), which, for the convenience of the Court, is lodged with the Clerk's office, and tabbed "A."

[5] Why alternate suppliers of parts do not have the incentive to overcome the substantial technological entry barrier in a

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Cases with fully developed records also show ample evidence of forcing. Transcript excerpts and evidence from the *HyPoint* and *Virtual* cases, *supra* at 4, of which this Court may take judicial notice, have been lodged with the Clerk's office, and tabbed "B" and "C."

For example, one customer in the *HyPoint* case testified as follows: "We were being forced to go back to Hewlett-Packard." An example of testimony from a forced customer in the *Virtual* case illustrates this same point. The president of a Prime customer who wanted to go with Virtual for their maintenance contract testified that because of Prime's policy it was not possible to choose Virtual.

> Q. Was your company attracted to the idea of using Virtual for maintenance?
>
> A. Yes.
>
> Q. Why was that?
>
> A. . . . maybe three years ago now . . . Prime entered into the business of servicing the Lundy terminals, which is a part of the PDGS system. As soon as that happened, our monthly hardware maintenance fee from Lundy went from $500 a month to $200 a month per terminal. That was the . . . effect of competition in the marketplace. So we were, and remain, eager for that competition to exist. . . .

See also Section D.2, *infra* at 17.

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high-tech industry is analyzed at ¶¶ 34-35 of the affidavit cited in footnote 3 above.

2. The marketplace, not the manufacturers, should determine which companies compete in the market for maintenance.

Kodak's chief argument is that this Court should examine the fiercely competitive market for copiers and micrographic equipment in general and determine that competition should allow Kodak effectively to keep ISOs from servicing Kodak equipment. Kodak talks of "finger pointing" and potential problems with customer loyalty if an ISO makes an error in diagnosing or fixing a problem with a copier. However, the antitrust laws tell us that it is the market, and not Kodak or another manufacturer, which should determine who competes.

In *National Society of Professional Engineers v. United States*, 435 U.S. 680 (1978), this Court discussed this concept. While *Professional Engineers* was a price fixing case, the reasoning behind the opinion applies here. In *Professional Engineers*, an association of engineers entered into an agreement whereby none of the engineers would provide customers with prices until the customer had chosen which engineer would perform the job. The Association's rationale behind this prohibition was that price competition would force engineers to cut corners in order to get customers. This cost cutting in turn would adversely affect the public health, safety and welfare. *Professional Engineers*, 435 U.S. at 685-86.

This Court agreed with the District Court, which held that such an arrangement "impedes the ordinary give and take of the market place." *Id.* at 692. While this Court agreed with the association that there was some risk that competition would cause some suppliers to make inferior

products to keep their costs down, this Court found that "[t]he Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Id.* at 695.

The Court continued: "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just cost, are favorably affected by the free opportunity to select among alternative offers." *Id.*

Even if projects were being engineered which could potentially harm the consumer, this Court reasoned that the Sherman Act did not differentiate between cases that affected public safety and those that did not. Competition would make those determinations, not the Court: "The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on manufacturers." *Id.* at 695-96.

The reasoning behind this Court's opinion in *Professional Engineers* applies in this case. The purpose of the Sherman Act is to promote competition. It is not concerned with individual concerns or needs, but with the needs of consumers as a whole. Thus, Kodak's argument that it needs vertical integration in order to benefit consumers and keep the integrity of its brand is specious.[6]

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[6] Kodak's main argument in favor of reversing the Ninth Circuit's decision is that it is economically unreasonable for a manufacturer to be required to sell parts to ISOs. Kodak claims that if the Ninth Circuit's decision stands, it will suffer great economic hardship as a result. This claim is completely undermined by the fact that the United States and IBM entered into a

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Kodak's position is equivalent to holding that Kodak needs to monopolize one market in order to compete in another. According to this Court, however, competition, not competitors, is the force that should affect quality, service, safety, durability and cost.

3. Competition among businesses that service Kodak copiers and micrographic equipment is interbrand competition as defined by this Court.

This Court defined interbrand and intrabrand competition in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977): "Interbrand competition is the competition among the manufacturers of the same generic product. . . . In contrast, intrabrand competition is the competition between the distributors . . . of the product of a particular manufacturer."

Under this definition, the competition among companies that service Kodak copiers and micrographic equipment is interbrand competition. The "generic product" is service of Kodak copiers and micrographic equipment. Each ISO that services Kodak copiers and

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consent decree in 1956, over thirty-five years ago, whereby IBM agreed, among other things, to sell spare parts to organizations which serviced IBM equipment. *United States v. International Business Machines Corp.*, 1956 Trade Cas. (CCH) ¶ 68,245 (S.D.N.Y. Jan. 25, 1956). If Kodak's assertions and predictions were correct, IBM should have been out of business long ago rather than being one of the most successful computer company in history.

micrographic equipment has its own brand of service. For example, companies may offer customers different price schedules or different methods of repairing copiers and micrographic equipment. The interbrand market is limited to the service of a single manufacturer's product by virtue of the technical differences in those products. Each manufacturer's copier requires unique parts and training for the copier's repair. Those parts and that training are not reasonably interchangeable with the parts and training needed for the repair of a copier made by another manufacturer.

The competition that exists among companies that service Kodak copiers and micrographic equipment is clearly not, under this Court's definition, intrabrand competition. For example, this case does not involve competition among dealers of a particular manufacturer's product. What ISOs sell is not the manufacturer's product; they sell the service of that product.

Companies that service Kodak copiers and micrographic equipment are not in a similar position to the distributors of Sylvania television sets in *GTE Sylvania*. Those distributors dealt with selling Sylvania television sets as Sylvania produced them. Thus, they were competing against other distributors which sold the exact same product. Here, however, the ISOs which service Kodak copiers and micrographic equipment have their own brand of service, and do not sell a Kodak product.

Image Technical Services sells the Image Technical brand of service, not the Kodak brand of service. By the same token, Joe's Auto Repair, which services Chevrolets, sells the Joe brand of service, not the Chevrolet brand.

C. The Ninth Circuit's Decision Does Not Contravene *Matsushita*

Contrary to Kodak's assertion, the ISOs' antitrust claims are not implausible, and therefore pass the test set out by this Court in *Matsushita Electric Industrial Company, Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986). Confirming the plausibility of these claims are two cases with fully-developed records. As mentioned *supra* at 4, an ISO obtained a verdict for $1.5 million in a monopolization case against Hewlett-Packard. *See* Judgment in *HyPoint Technology, Inc. v. Hewlett-Packard Co.*, Case No. C87-2484 (N.D. Ohio 1990) (appeal pending) and tabbed "D." Another independent service firm won $25.3 million in a tying case against Prime Computer. *See* Judgment and Injunction in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, Case No. 89-CV-71762-DT (E.D. Mich. 1990) (appeal pending) and tabbed "E." This Court may take judicial notice of these filings.

The litigation in *Matsushita* lasted for twelve years and the record was replete with evidence, albeit insufficient to establish an antitrust violation. Having had "several years of detailed discovery," *Matsushita*, 475 U.S. at 578, the plaintiffs had ample time to develop their record. In contrast, the District Judge in the case at bar severely restricted discovery, and there has been no expert economic testimony on market definition and possible market imperfections. Therefore, there is no basis for Kodak to argue that plaintiffs' theories make no economic sense.

As evidenced by the judgments in the cases above, plaintiffs' theories have already been proven in similar cases. In the *Virtual* case, an expert economist testified

extensively on market definition. *See* Affidavit of Jeffrey Mackie-Mason, *supra* at n.4, and tabbed "A." The opinions expressed in that affidavit were accepted by the judge and the jury, who obviously felt that these opinions made more economic sense than those proffered by the manufacturer.

Kodak assumes that anyone who wants to buy a copier has perfect information about all the contingencies, such as the life of the copier and the cost of maintenance. Kodak also assumes that a customer looks at all copiers and micrographic equipment before deciding which one to purchase. It is equally, if not more possible, that a customer will consider buying a Kodak copier only for a specific reason, or that information about lifetime costs of copier maintenance is imperfect, or that in a large organization the purchasers of equipment and service are different and have different objectives. These are the types of market imperfections to which the Ninth Circuit referred. By definition, market imperfections are questions of fact.

D. The Effects On Competition Will Be Far-reaching If The Ninth Circuit Is Reversed

1. Competitors will go out of business.

If manufacturers are permitted to maintain their control of the parts necessary to service their equipment, the result will be that hundreds of ISOs, which came into existence based on the availability of those parts, will be driven out of business. By denying ISOs access to parts, manufacturers effectively reserve the market of maintenance of their systems to themselves. Without parts it is

impossible for ISOs to service equipment. Because parts are unique to a particular machine, manufacturers are usually the only source of those parts.

2. Customers will suffer because of fewer choices and higher cost.

The result of the manufacturers' stronghold on their parts will be that customers will be severely limited in their choice of a maintenance firm. *See* B.1, *supra* at 8. In fact, if the manufacturers deny ISOs access to parts, a customer will have no choice but to turn to the manufacturer for maintenance. Manufacturers generally charge 25-30% more than ISOs.

An *amicus* brief filed by the Attorney General's office for the State of North Carolina on behalf of a state hospital in a recent case in North Carolina District Court illustrates the fact that customers benefit from and are in need of competition in the market for maintenance of high-tech equipment. *General Electric Co. v. Thomas J. Zuchowski* and *General Electric Co. v. R. Squared Scan Systems, Inc.*, (M.D.N.C. Case Nos. C-87-59-WS and C-87-249-WS). The *amicus* brief ("Brief") is lodged with the Clerk, and tabbed "F."

General Electric manufactures a high-tech medical machine called a CT scanner which is used in hospitals nationwide. Like other manufacturers attempting to maintain a hold on maintenance of its equipment, GE restricted access to its diagnostic software and manuals. This restriction forced customers to choose GE for maintenance. Without access to the manuals, ISOs were unable to repair the machines adequately; thus they were squeezed out of the market by GE's practices.

The North Carolina Memorial Hospital, a state hospital, which purchased a CT scanner from General Electric, took the position that it would be harmed if GE were permitted to restrict access to the necessary tools to maintain the CT scanner. The *amicus* brief filed for the hospital illustrates the severe problems faced by customers of a manufacturer's equipment who are left without choice of a maintainer.

The hospital did not believe there was any legitimate reason why it should have to choose GE in order to obtain sufficient maintenance coverage: "Why should the owner of any CT scanner be forced to choose between contracting for service on the CT scanner (1) with a company that may or may not have sufficient diagnostic software and service materials, or (2) with GE to assure itself of access to the sufficient software and manuals?" Brief at 1-2.

According to the hospital, "[a] lack of competition in service will directly and adversely affect the cost and quality of health care." *Id.* at 2. The hospital recognized that "[w]ithout effective competition, it appears to [the hospital] that GE has no incentive to provide the best service at a reasonable cost, and health care providers and the public suffer the consequences." *Id.* at 4.

GE made some of the same arguments for vertical integration as Kodak does. The hospital concluded that these arguments were pretextual or irrelevant. Like Kodak, GE argued that it was necessary to retain control of the diagnostic manuals in order to insure better service for the customer. However, the customer, in this case the hospital, had a completely different view of the situation.

The hospital stated in its brief that the growth of ISOs which service the scanner had actually "resulted in better service being available at a lower cost. Because other manufacturers of CT scanners do not service GE or Technicare CT scanners, independent service organizations provide *the only competition* for GE in the area of service." *Id.* at 5. Thus, according to the customer, they received better quality service as a result of the ISOs' presence in the market.

Additionally, the argument that manufacturer control is necessary to maintain quality, prevent "finger pointing," and compete in the market for the high-tech equipment is unfounded. According to the hospital, it was not until the hospital became interested in contracting with an ISO that GE changed its practices and limited access to its diagnostic software and service manuals. *Id.* at 3. Thus, it was apparently not necessary for GE to compete in the market for scanners that it maintain control over its manuals and software.

VA hospitals have recently made the same point as North Carolina Memorial. The Office of the Inspector General of the Department of Veterans Affairs, after a congressional inquiry, investigated bidding procedures for service contracts of medical equipment (specifically CT scanners) within the Department of Veterans Affairs. The Inspector General prepared a report which recently became available under the Freedom of Information Act. 5 U.S.C. § 552 (1986). This Court may take judicial notice of that report, which is lodged with the Clerk and tabbed "G."

Several Veterans Affairs Medical Centers (VAMCs) purchased a CT scanner manufactured by a company called Picker. Several of the contracts awarded to Picker contained restrictions which required that tubes needed to service the scanners be purchased only from a company which Picker owned. There were other restrictions which required that service technicians be trained by Picker, and that Picker diagnostic software be used. The Inspector General found that "[t]hese specifications . . . were considered restrictive since only the original equipment manufacturer could meet the performance criteria contained in the specifications." Report at 4.

The Inspector General found that two types of tubes were compatible with the Picker CT scanner. Picker attempted to justify its requirement that only their company's tubes be used to service the machines by claiming that the other tubes were unsafe and could damage the machines. After extensive research, the Inspector General "found no factual basis for Picker alluding to a lack of safety or performance of [the other] tube." *Id.* at 5. The same was true of the restrictive specifications regarding software which required the contractors to obtain a license before using the diagnostic software. *Id.*

The Inspector General recommended that the VAMCs prepare contracts themselves that did not contain restrictive terms. He stated that this would "increase competition by allowing all qualified sources to compete for a contract award." *Id.* at 6.

E. Courts Of Other Countries And Multinational Organizations Which Have Considered This Issue Have Decided In The Same Way As The Ninth Circuit

Kodak and the *amici* supporting its position, particularly the Computer Business Equipment Manufacturer's Association, claim that vertical integration is necessary in order for manufacturers to compete not only against each other but against companies from other countries. This argument is misleading: every foreign jurisdiction which has considered this issue, including Canada, Japan, and the European Court of Justice, has ruled similarly to the Ninth Circuit. Thus, companies from other countries are not free to curtail access to their parts. It follows that Kodak and other manufacturers in the United States will not be disadvantaged when competing against other countries.

1. The Canadian Competition Tribunal entered a mandatory injunction requiring Xerox to sell parts to an ISO.

In a case with strikingly similar facts, the Canadian Competition Tribunal held that parts for Xerox copiers and micrographic equipment constituted a relevant market for antitrust purposes and required Xerox to sell parts to an ISO. *Canada (The Director of Investigation and Research) v. Xerox Canada, Inc.*, (1990) 33 Can. Pat. Rep. 83 (Competition Tribunal).

As Kodak did in this case, for some time Xerox sold parts for its copiers and micrographic equipment with no restrictions. After Xerox in the United States determined that the revenues from the services of their copiers and

micrographic equipment was being lost to ISOs, it instituted a policy limiting access to parts. *Id.* at 5. Xerox Canada shortly followed suit. According to the Competition Tribunal, "[t]his was done in order to eliminate competition from organizations which had grown up and were providing maintenance service for Xerox photocopiers." *Id.* The Tribunal also found that "[t]he curtailment of the supply will also effectively eliminate most of the second-hand market in Xerox copiers. . . . " *Id.*

Exdos, an ISO, competed with Xerox for customers who needed service of Xerox copiers and micrographic equipment. The Tribunal found that "[e]vidence. . . . makes it clear that the second-hand copier market and the option for an alternate source of service provided by ISOs are beneficial to consumers. They allow for customer choice which would not otherwise be available." *Id.* at 18. The Tribunal also found that the service provided by Exdos and other ISOs was "comparable to that provided by Xerox, and on occasion better and at a lower price." *Id.*

After the ISOs began to succeed, Xerox introduced a policy in the United States, which was shortly followed by Xerox Canada, that Xerox would limit purchasing of its parts to end users. This policy "was clearly designed to undercut the viability of the ISOs and to preserve, if not enhance, the revenue derived by Xerox Corp. from the service aspect of its business." *Id.* at 25.[7]

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[7] The Tribunal, like the European Court of Justice, found that as a practical matter Exdos could only obtain parts from Xerox. *Id.* at 32. Cannibalization of machines, the Tribunal held, was "not an adequate source of supply over the long run." *Id.*

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As is the case here and in the EEC case cited in Section E.2, *infra* at 25, Xerox argued that the relevant market was the market for copiers and micrographic equipment while the Director argued that the relevant market was Xerox copier parts, particularly post-1983 Xerox parts. *Id.* at 35. Using factors similar to those used by this Court in *Brown Shoe*[8] and citing *Image Technical Services* and the EEC case discussed in Section E.2, *infra*, the Tribunal agreed with the Director. *Id.* at 52. This Court should reach the same conclusion.

Although the Tribunal acknowledged Xerox's argument that it needed to curtail supply of its parts in order to compete in the copier market, the Tribunal did not agree with that argument. *Id.* at 43. The Tribunal found that "even if Xerox were forced to price parts competitively in the long run, a present owner of a Xerox machine cannot easily, during the economic life of that

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Because some parts are used much more frequently than others, ISOs relying on "cannibalization" would find themselves with too few of some parts and too many of others. *Id.* In addition, other sources of Xerox parts are insufficient because they do not manufacture *all* parts needed to service Xerox equipment. *Id.* at 33.

[8] The factors included: actual and practical competition, integration and stages of manufacturers, method of production or origin, physical characteristics of products or services, end users of products, product substitutability, geographic area, and relative prices of goods or services. *Id.* at 42.

machine, switch to another manufacturer's brand of copier." *Id.* at 44.[9]

The Tribunal also did not accept Xerox's claim that it needed to control its parts supply because of the danger that dissatisfied customers of ISOs would blame Xerox. The Tribunal stated that "[i]n fact, it might be argued that Exdos, perhaps more than Xerox, has an *immediate* interest in providing timely, high-quality service and repairs since that is its business." *Id.* at 55-6.

The Tribunal held that Xerox itself created a market for Xerox copier parts "by selling to anyone who wished to purchase," *id.* at 64, and that section 75 [of Canada's competition law] was violated by Xerox's refusal to supply parts to ISOs. *Id.* at 81. Accordingly, the Tribunal entered an order requiring Xerox to sell parts to Exdos. *Id.*

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[9] The Tribunal continued: "it is no answer to Exdos' customers to tell them that 'based on some Chicago School of Economics theory . . . [they] should wait until the market rights itself' and that in the long term when they purchase their next copier they can purchase from a company that provides better and cheaper parts and service." *Id.* This type of analysis is similar to what this Court stated in *Aspen Skiing*: " . . . Ski Co. was not motivated by efficiency concerns and . . . it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen Skiing*, 585 U.S. at 610-611.

2. The European Court of Justice determined that the relevant market for antitrust purposes was parts and service of a particular manufacturer's cash register.

Long before this became an issue in the United States, the European Court of Justice considered whether service of a particular manufacturer's product could constitute a relevant market. The Court found that a manufacturer which was essentially the only source of production of spare parts for its machines occupies a "dominant position" (similar to a monopoly under U.S. antitrust laws) in the market for those spare parts. *Hugin Kassaregister AB and Hugin Cash Register Ltd. v. E.C. Commission*, 1979 E. Comm. Ct. J. Rep. 1869, (Court of Justice, Case 22/78, May 31, 1979) 3 Comm. Mkt. L. R. 345. The court refused to accept the defendant's proffered business justification that it needed to monopolize parts and after-sales service in order to maintain or enhance its position in the market for cash registers.[10]

Hugin was a company which manufactured cash registers with a 13% market share within the United Kingdom. *Hugin*, 3 Comm. Mkt. L. R. at 348. Hugin's policy was to allow only approved Hugin technicians to service Hugin cash registers; "thus independent maintenance and repair undertakings [were] excluded from this field of activity." *Id.* Liptons was to be an authorized dealer

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[10] The Court of Justice annulled the decision of the Commission on the ground that Hugin's actions only affected trade within the United Kingdom, and did not affect trade between member states, a requirement of Article 86. *Hugin*, 3 Comm. Mkt. L. R. at 368.

and repair organization for Hugin in the United Kingdom. During contract negotiations Hugin supplied Liptons with both cash registers and spare parts. However, a problem developed in their business relations and Hugin refused to supply spare parts to Liptons which caused Liptons to bring suit against Hugin. *Id.* at 349.

The claims of the parties were similar to those in this case. Liptons claimed that because other manufacturer's spare parts could not be used to repair Hugin cash registers, and that Hugin was the sole source of production, Hugin had an "absolute monopoly" over its spare parts. *Id.* at 350. Liptons also alleged that Hugin had a "dominant position" in after-sales service for its machines. *Id.* Hugin, like Kodak and the *amici* supporting Kodak's position, argued that such market definitions were too narrow. Hugin claimed that competition among cash register manufacturers was "extremely fierce" and the relevant market was for all cash registers, not Hugin parts or service of Hugin cash registers. *Id.*

Hugin, like Kodak, claimed that it had no power to control prices of its spare parts because it would risk losing customers to other manufacturers and thus could not have market power. The Court found that "it can certainly be accepted that such factors do indeed prevent *excessive* prices being fixed for spare parts. I do believe, however, that at the same time there remains scope for independent conduct within the meaning of Article 86 of the EEC Treaty at least to a certain extent." *Id.* at 354. The Court found that the value of spare parts in relation to the price of each cash register was relatively small (3%). The same was true of service in relation to cash registers. "In view of that situation it can certainly be assumed that

even relatively substantial increases in the price of spare parts are possible without affecting the customer's choice of a make of cash register." *Id.*

The independent companies were "more dependent on Hugin . . . than normal cash register customers with regard to Hugin spare parts. For the [independent companies] it is not so simple . . . to switch to other makes in reaction against excessive prices for spare parts." *Id.* at 355. The Court held, in essence, that the independent companies were at the mercy of Hugin because of the uniqueness of Hugin spare parts.

The Court concluded that "Hugin is clearly able, without running the risk of an unfavorable reaction from its ordinary cash register customers, to pursue a policy in connection with its spare parts which eliminates independent maintenance companies from competition in the field of Hugin machines." *Id.* at 356.

The Court also considered Hugin's argument, which was virtually identical to Kodak's, that monopolizing after-sales service is justified because it allows for increased competition in the market for cash registers which in turn benefits consumers. The Court found that if Hugin's position were adopted, it would amount to "the complete elimination of independent maintenance undertakings and thus a fundamental alteration of the structure of competition." *Id.* at 360.[11] The same is true here.

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[11] In *Volvo A.B. v. Erik Veng*, 4 Comm. Mkt. L. R. 122 (1988), the European Court of Justice reached a similar conclusion. In that case, the court defined the relevant market as body panels

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3. A Japanese Court has recently reached a similar conclusion on this issue.

The Osaka District Court recently held that a manufacturer of parts was required to sell those parts to independent service organizations. *K.K. Tsutsuki Kanteisho v. Toshiba Shokoki Saabisu K.K.*, 1365 Hanji 91 (October 30, 1990) (Osaka Dist. Ct. Nos. Showa 60 [1980] (WA) 2665 and 2666). Toshiba Elevator, which serviced elevators manufactured by Toshiba, adopted a policy of refusing to sell Toshiba parts and components necessary to service Toshiba elevators to ISOs which also serviced Toshiba Elevators.

In that case, the owner of a Toshiba elevator contracted with an independent service organization. When that company needed parts to repair the elevator, Toshiba Elevator refused to supply the parts. Toshiba Elevator maintained that it was necessary to limit access to parts for safety reasons. The Osaka District Court rejected this reasoning, stating that the term "unreasonable" as used

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manufactured by Volvo: "The fact nevertheless remains that the owner of a vehicle who, at a given moment, decides to repair the bodywork of his vehicle rather than change model is obliged to purchase (either directly, if he repairs the car himself, or indirectly through a garage in the manufacturer's network or through an independent repairer) a body panel which is identical in shape to the original part. Consequently, for the owners of a vehicle of a particular make the 'relevant market' is the market made up of the body panels sold by the manufacturer of the vehicle and of the components which, being copies, are capable of being substituted for them."

in Article 2(9)(vi) of the AML [Antimonopoly Law] and Item 15 of the Designation [by Japan's Fair Trade Commission] should be judged solely from the standpoint of maintaining competition. The Court held that whether or not the safety of elevators was jeopardized by the defendant's selling only parts and components to [plaintiffs] was a consideration which was not directly related to the maintenance of competition and should not be taken into account when judging on the issue of "unreasonableness."

The Toshiba Elevator case follows *Wakodo K.K. v. Kosei Torihiki Iinkai [Fair Trade Commission]*, 781 Hanji 21 (July 10, 1975) (S. Ct. 1st Petit Bench No. Showa 46 [1971] (TSU) 82), which held that in cases in which the conduct in question seems justifiable, that is, a usefulness or necessity from a business management viewpoint which has no direct relationship with the competition order, a justifiable reason cannot be recognized.

IV. CONCLUSION

The way for Kodak to sell more service is to sell the best at the lowest price, just as IBM has been doing since its consent decree in 1956. It is not necessary to revise our antitrust laws to help Kodak compete against other countries, because they are subject to the same rules.

Most importantly, it is unnecessary and undesirable to change the long-standing rule that market definition is a factual inquiry. When such an inquiry is made, it is

obvious that there are service markets for high-technology products of a single manufacturer. If there were not, the organization filing this brief would not exist.

Respectfully submitted,

RONALD S. KATZ
Counsel of Record
General Counsel for
Computer Service
Network International
COUDERT BROTHERS
4 Embarcadero Center
Suite 3550
San Francisco, CA 94111
(415) 986-1300

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